SUPREME COURT, U. S.

FILED

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IN THE

# Supreme Court of the United States

OCTOBER TERM—1967

No. 1012

UNITED STATES OF AMERICA,

Respondent,

*v.*

ARTHUR J. FISHER,

Petitioner.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

WILLIAM J. CORCORAN,
Attorney for Petitioner,
11 Park Place,
New York, New York.
BA 7-2242

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IN THE

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UNITED STATES OF AMERICA,

Respondent,

*v.*

ARTHUR J. FISHER,

Petitioner.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals, for the Second Circuit, entered in the above entitled case on December 15, 1967.

### Opinion Below

The opinion of the United States Court of Appeals, Second Circuit, is not reported to date.

### Jurisdiction

The jurisdiction of this court is invoked under Title 28 U.S.C., Section 1254(1).

## Questions Presented

(1) Whether the petitioner's constitutional rights were violated by the admission of the testimony of the FBI Agent as to statements made by the petitioner during in-custody interrogation, absent the four warnings mandated by this court in *Miranda* v. *Arizona,* 384 U. S. 436, as to form and number.

(2) Whether a warning "that he did not have to make any statement, any statement he did make could be used against him in a court of law; prior to making a statement he had the right to consult an attorney of his choice" meets the requirements of *Miranda* v. *Arizona, supra,* which directs that "he must be warned prior to any questioning that he has the right to remain silent . . ."

(3) Whether the admitted failure to tell the petitioner at the time of the in-custody interrogation that the Court would appoint an attorney for him if he lacked funds is later cured by proof during the trial that the petitioner was earning $450 a week. Otherwise stated is the FBI agent authorized to make a determination during the questioning to withhold the warning that the Court would appoint counsel if the petitioner lacked funds on the basis of his own judgment as to the circumstances of the petitioner.

(4) Whether the questioning of the petitioner for approximately 35 to 40 minutes in the automobile of the FBI by two agents at a time the petitioner suggested that the interview be held in his office, "where we can sit down comfortably" constituted a deprivation of his freedom in a significant way and amounted to in-custody interrogation.

(5) Is the petitioner as Financial Secretary of a union whose members are employed by a contractor, such an officer who comes within the proscription of the Taft Hartley Law, 29 U.S.C. Section 186(b) barring him from receiving a thing of value, where the proof shows that his duties were to collect union dues with authority to sit on the executive board with no authority or duty to represent employees in their relations to the employer as to wages, grievances, conditions of labor or collective bargaining, especially in view of the fact that the petitioner was employed by the contractor in the supervisory capacity of master mechanic.

(6) Was the petitioner's right to be informed of the charge violated by being charged in the Information as an "officer, employee and representative" which are three separate categories under Section 186(a) and (b) especially when the Trial Court struck proof sought to show that the petitioner was not a "representative" and where three motions for bills of particulars were not productive of the information sought as whether he was charged as an "employee and representative".

(7) Did the Trial Court err in refusing to instruct the jury that affirmative testimony of good character, alone, may be enough to raise a doubt of guilt instead of coupling character evidence along with all other evidence in the case.

(8) Was the receipt of the materials and equipment in question, a transaction in the regular course of business having in mind that the petitioner was a supervisory employee of the employer and part of management, whose daily work over a period of approximately two years, included paying for materials for the employer when the credit of the employer was low and whose daily presence on the job for unlimited hours made him in the opinion of the employer a good

credit risk, and who was continuously working overtime and not charging the same fully to his employer and who paid for the materials in a bill furnished by by the employer some 18 months prior to the filing of the Information especially where the transaction was open and notorious and not hidden or concealed; where the records of delivery were on the forms of the employer and prepared by numerous drivers at the direction of the employer or its manager and where such deliveries were recorded in a diary, without formal sales slips or was this transaction a gift in violation of the act.

## Statutes Involved

Pertinent provisions of the Taft-Hartley Law, Section 302, 29 U.S.C. Section 186(b) with which the petitioner is charged with violating reads as follows:

29 U. S. C. § 186, in pertinent part, reads:

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to rep-

resent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(c) The provisions of this section shall not be applicable . . . (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business. . . .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

## Statement

The petitioner was charged in a two-count information* filed in the United States District Court for the Southern District of New York with violation of 29 U.S.C. Section 186(b) with having *received* a thing of value, viz.:

> While an officer, employee and representative of a labor organization which represents, seeks to represent and would admit to membership employees who are employed in an industry affecting commerce, unlawfully, wilfully, and knowingly requesting, demanding, receiving and accepting and agreeing to receive and accept building and construction materials, the use of building and construction equipment, and the use of workers in connection therewith from the employer of the aforesaid employees (Title 29, U. S. Code, Sections 186(b), 186(d), 142, 152).

Count two of the Information was similar to count one except it charged the petitioner with having *requesting and demanding* the thing of value some months later. The petitioner was found guilty on count one and acquitted on count two.

The petitioner was hired by the employer Comarco Contractors Inc. in the supervisory position of Master Mechanic in charge of its equipment in connection with road construction. The President, Vice President and Treasurer and field superintendent of the employer corporation are brother members with the petitioner of the local union. Proof was offered that the petitioner did not deal with the employer on behalf of the union or its members with respect to wages, conditions of labor, grievances or anything related directly or indirectly with labor con-

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* The petitioner was previously indicted by the Grand Jury for the offense charged in count one, solely in the capacity of business representative and although superseded by the information, government declines to consent to dismissal of indictment.

tracts between the employer and the union. The position of financial secretary did not authorize the petitioner to do any of these things. His position of financial secretary authorized him to sit on the executive board of the union. The executive board on the other hand did not negotiate or execute collective bargaining agreements with employers.

While employed as master mechanic, the petitioner had gotten married and commenced to build his home on a plot of ground across from his mother which she had given him. The petitioner made arrangements with the employer to purchase building materials such as crushed stone, ready mix concrete as well as the use of concrete forms in order to build his foundation. He also obtained the use of a front end loader on a weekend to dig the cellar. All of this was done, according to the petitioner, by way of an agreement with the employer, who promised to send him a bill when the work was completed.

Some months after the work was started, two FBI Agents visited the job site where the petitioner was employed as master mechanic and interrogated him for 35-40 minutes in their car, with one agent in the front seat with the petitioner and the other agent in the rear. The petitioner had suggesed to the agents that the interview be held in his office on the job site, which is provided by the employer for the master mechanic but this offer was not accepted.

During the interview with the agents, the petitioner was not advised of his right to remain silent, altho he advised that he did not have to make a statement. Neither was the petitioner advised to get a lawyer before he spoke to the agent. Neither was the petitioner informed that counsel could be appointed for him if he lacked funds to retain an attorney. Nor was the petitioner informed that he was under investigation, altho the agent said he told the petitioner that he was conducting an investigation concerning the contractor and himself.

The FBI Agent was permitted to testify, over objection, that the petitioner had informed him "he didn't know whether he was ever going to be billed for it or whether the materials were gratuitous". The petitioner had testified that he had repeatedly requested a bill and finally received one in the sum of $941.50 which was paid by the petitioner on May 10, 1965, a period of 18 months prior to the filing of the information on October 20, 1966.

The use of the concrete forms and front-end loader which were used on a weekend were paid for by the petitioner under an arrangement with the employer under which the petitioner did not charge for the full amount of the overtime that he worked.

Altho the entire transaction above described was open and notorious, and was neither hidden nor secret, the government contended it was a gift and not a sale in the regular course of business, despite the fact that all delivery slips of the drivers were turned into the employer, evidencing the day of delivery, the amount of material and the name of the driver. Further the employer, through entries by the officers and office manager kept records of the transactions in a diary, altho no formal sales slips were made out.

Witnesses testified to the fact that they heard the petitioner request a bill for the materials delivered and the FBI agent testified that in his interview with the petitioner on April 8, 1965, the latter informed him that on that day he advised Orlando Comarco (Treasurer and Field Superintendent) that he had not been billed and that as much as eight weeks before he had told Thomas Camarco (President) that he had not been billed for the material. He also informed the Agent that it was his intention to pay for the material and equipment if he had been billed for it, but then the Agent added in answer to a further question of the Assistant U. S. Attorney "he said he didn't know whether he was ever going to be billed for it or whether the materials were gratuitous".

## Reasons Relied on for Granting Writ

1. The petitioner contends that a serious injustice has been committed affecting not only himself, but unless corrected, will affect hundreds of other persons similarly situated in the construction industry who are employed in a supervisory capacity such as master mechanics.

The proof was incontrovertible, that the employment of the petitioner was requested by the employer, that he was efficient and competent, that he was in charge of construction equipment valued at hundreds of thousands of dollars; that he worked faithfully for the employer with long hours; that the three principal officers of the employer corporation were fellow members of the union with him; that the petitioner's father before he died had worked for the same employer and that the employer had directed the delivery of the materials and equipment to the site where the petitioner was building his home in Carmel, New York, following his marriage.

The supply yard of the employer was but seven miles from the building site where the petitioner was excavating his cellar and building the foundation. No other supplier was nearby. The petitioner at times used his own money to purchase supplies for the employer when the credit of the employer was low. He was receiving $450 a week as master mechanic and the petitioner remained with the employer for almost a year after the delivery of the materials in question, in charge of the construction of a big highway job.

The Trial Court erred in permitting the FBI Agent to testify as to the interview with the petitioner, at a time that the petitioner was not advised of his rights. It was this interview and the statements made by the petitioner to the Agent which the Government used in weighting the scale given to the jury as to whether the transaction was a "purchase" or a "gift".

Altho the section in question does not require intent or motive to be established, being *malum prohibitum*, the testimony of the Agent was critical in tipping the scale, for it undoubtedly generated the Jury's mind into rejecting the presumption of innocence by planting in the minds of the members the "motive" or reason why the petitioner paid the bill at the time that he did, namely, the visit of the FBI Agent.

2. The Trial Court rejected the objections to the testimony of the FBI Agent, stating that they were adequate warnings; the Court of Appeals in its opinion says the warnings complied with that approved in *Miranda* v. *Arizona*, 384 U. S. 436, in every particular except one, namely that the petitioner was not told that counsel could be appointed if he lacked funds. A close scrutiny of these opinions will demonstrate that the protections with which the accused is to be clothed, were not given. Unless a halt is declared, here and now, the magna charta of the "four rights" given to the accused at the "exact point where individual freedom comes into conflict with state police power" will be eroded, slowly, gradually and imperceptibly.

Unless the challenge is met now, some Trial Court may decide that two or three warnings only are necessary; or only one. An Agent or law enforcement officer will be permitted to make his own determination as to whether the accused should be informed of his right to have counsel appointed if he lacks funds, solely on the basis of appearance or dress or the house or neighborhood in which he resides. This erosion will put "Miranda" back with "Dred Scott" slowly but surely. Either the "four warnings" will be given to a suspect, rich or poor, intelligent or illiterate, irrespective of color, origin, religion or lack of it or these so called "warnings" will in themselves become a discriminatory practice in their choice and selection.

This Court in its inspired opinion in *Miranda, supra,* painstakingly speaks of the right of the accused to remain silent and to be advised of this right, no less than eleven times. This warning of "silence" is not to be equated with the warning that the accused does not have to make a "statement", for it is readily discernible, that a person being questioned while in custody and deprived of his freedom in a significant way, may assume that he does not have to make a written statement. In the mistaken assumption that only a written statement can be used against him, the accused unburdens himself by talking "his head off". In this way the cure would be worse than the disease. The Court of Appeals in its opinion, fails to follow the plain language of this Court in its use of the world "silent" or "silence" and concludes that the warning not to give a statement is the equivalent of remaining silent. This observation as to the pointed difference between remaining silent and not being obliged to make a statement, is the fact that in most criminal investigations, the officer or agent seeks to obtain a written statement or confession.

In story and fiction, TV and movie, the average viewer is indoctrinated with the written statement or confession given by the accused during interrogation. Hence any purported warning in the case at bar, that the petitioner did not have to make a statement, did not meet the requirement of *Miranda* of his right to remain silent. And this warning the Agent testified he did not give the petitioner.

3. The language of Section 186(a) and (b) refers to several categories of persons who are forbidden to receive a thing of value from an employer whose employees are members of a union or which union would admit to membership these said employees, viz.: (a) a representative (b) a labor organization, or any officer or employee thereof.

The Information charged the petitioner in all three categories, namely as an "officer, employee and representa-

tive". It is vague, unclear and duplicitous. Altho three motions were made to clarify this description, the only thing the petitioner was informed was that he was charged as financial secretary of the union. The Trial Court rejected attempts to show that the petitioner was not a representative and the case went to the jury on the theory that the petitioner violated the Act as an officer, *per se*. No proof was attempted to show that he represented any of the employees in the customary ways a representative acts, viz.; handling grievances, negotiating labor contracts or enforcing such labor contracts or in any manner acting as a representative of the union in its relationship to the employer.

Altho it was contended that the section in question sought to prohibit the making of "sweetheart" contracts or other favored treatment to an employer to the detriment of the members, and that it was necessary to connect or tie in the position of officer with some activities that would enable the officer to commit the unfaithful acts of selling out the union, the Trial Court held that the position of the petitioner as Financial Secretary, standing alone was sufficient. It disregarded proof that the framers of the Act, in their debates in the Congress intended to enact prohibitions as to those persons capable of committing these wrongs.

The Act also speaks in the same section (186(a)(2)) of an "employee thereof". Standing alone this word does not relate to a person capable of committing the prohibited acts. For example: a charwoman who is an employee of a union such as UAW in Detroit cleans the headquarters building at night when the offices are closed. If the UAW has over 50,000 members employed by the Ford Motor Company, does the Act prohibit Henry Ford II at Christmas time from giving this charwoman a $5 gift out of the spirit of the Season? It is inconceivable that the framers of the Act contemplated this charwoman capable of selling out the Union of 50,000 members to the Ford Company.

Yet she is an "employee". Hence standing alone, the word "officer" in this sub-section has no more meaningful connotation than the word "employee" absent the activities that must be associated with the word, to spell out the capability of committing the wrongful act.

The importance of this question may be gathered from fact that the U. S. Attorney declined to consent to the dismissal of the Indictment which previously charged the petitioner with violation of the Act under Count ONE, in the capacity of Business Representative and sought to test out the violation under the category of officer *per se* in the Information.

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The holding of the Trial Court, concurred in by the Court of Appeals, that an officer, *per se,* of a Union is a sufficient description to charge the petitioner with a violation of the Act, without the necessity of examining into the extent of his responsibility as such officer, throws aside the reasons and objectives of the framers in enacting the Act in the first place. An officer, under this concept, such as the petitioner, who has no dealings with the employer and is isolated from the capability of selling out the union to an employer by way of favored treatment, would be subject to a penalty under the most innocent of circumstances. This would amount to guilt by association, and would not constitute due process.

Research points up the fact that this is a question of first impression, as the cases all appear to establish that the officer charged with the violation of the Act, was shown to *represent* the Union members in their dealings with the employer. Unless this is true, the charwoman in the UAW example would be guilty of violating the Act in accepting the nominal gift from Mr. Ford.

4. The petitioner, in the case at bar, offered a number of witnesses who testified to his reputation for truthful-

ness, veracity and honesty in the community in which he resides. The Trial Court declined to instruct the jury that this character evidence alone, may be enough to raise a doubt of guilt and thus the petitioner was deprived of its value in determining guilt beyond a reasonable doubt.

5. On the question of the receipt of the materials and equipment, all the evidence pointed to a transaction in the regular course of business, assuming that the petitioner was such an officer proscribed under the Act. The provisions of Section 186(c) permitting the petitioner to deal with the employer were fully met, having in mind the posture of the petitioner and the employer. If the bill was not paid in 30 days, as might be required of other customers, this did not make the transaction a gift rather than a sale.

The employer admitted that the petitioner was working for him every day, was not about to run away, was in charge of the job and equipment as master mechanic and was a good credit risk. The date of payment is not controlling as to whether a transaction is a purchase or a gift, although the Government sought to make it so by inferring that the petitioner only paid the bill when the FBI agents were in the area investigating.

The petitioner testified along with other witnesses that he repeatedly requested a bill of the employer and was constantly put off because the employer was busy and would get around to it. Yet the bill submitted by the employer was paid by the petitioner 18 months prior to the filing of the Information.

The finding of the jury as to this question was against the believable evidence and was prompted by the testimony of the FBI agent, who set the stage for the Government's argument that payment was made solely because of the investigation being conducted.

## THE ARGUMENT

### POINT I

**The basic rights of a person during in-custody interrogation as mandated by this Court in *Miranda* v. *Arizona*, should not be whittled away under any pretense, any place, any time.**

Judge George Edwards, of the United States Court of Appeals for the Sixth Circuit and presently Chairman of the Committee on the Administration of the Criminal Law of the United States Judicial Conference in his excellent article in the Fordham Law Review, Volume XXXV No. 2 for December 1966 on the impact of *Miranda* v. *Arizona*, 384 U. S. 436, in his opening sentence says:

> "In world history the significant contribution of the United States of America has been its elevation of the rights of the individual as compared to the power of the state. . . . The concept of individual freedom is inextricably bound up with the phrase 'due process of law'. The earliest version of this idea is found in the words of the Magna Charta; the most recent in the words of Chief Justice Warren in *Miranda* v. *Arizona*."

Apart from the glowing tribute paid the Chief Justice in this Court's inspired decision, the remarks of Judge Edwards represent the soundest legal argument for reversing the Court of Appeals below in failing to implement these basic rights of the petitioner in the case at bar. This Court in *Miranda, supra* at pages 469-471, 476, 478-479, 489, 491, said:

> "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences

of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. . . . He must be warned prior to any questioning that he has the right to remain silent . . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

In the case at bar, in the examination conducted on the *Voir Dire,* the FBI agent stated that he did not inform the petitioner of his right to remain silent or of his right to have an attorney before he spoke to him:

"Q. Did you at any time during this interview say, 'Mr. Fisher,' in words or substance, 'you have a right to remain silent'? A. No, sir.

* * * * * *

Q. Did you advise him to get a lawyer before he spoke to you? A. No, sir.

* * * * * *

Q. Isn't it a fact that the statement that you made advising him of his constitutional rights, assuming that you made it, is the stock phrase that members of the FBI use? A. Yes, sir."
(Appendix to Appellant's Brief page 64a.)

When the motion to bar the testimony of the Agent on the ground that the Petitioner was not adequately advised of his constitutional rights, was denied, the Court took a 5-minute recess and then the Agent was recalled, this time with the jury present (66a-67a).

On direct testimony in answer to the questions of the Assistant U. S. Attorney the following occurred (68a):

"Q. Before interviewing Mr. Fisher, did you advise him of anything? A. Yes, sir.

Q. What was that? A. We advised him that he did not have to make any statement; any statement he did make could be used against him in a court of law; prior to making a statement he had the right to consult an attorney of his choice."

Apart from the fact that the answers differ from that given on the *Voir Dire* and that given 5 minutes later following the recess before the jury, on the question of whether the Agent advised the petitioner of his right to have a lawyer with him before he spoke to the Agent, the Agent at no time informed the petitioner of the most important constitutional right to remain silent; which warning as to his right of silence "must be accompanied by the explanation that anything said can and will be used against the individual in court".

## POINT II

**The information charged the defendant with violation of the Act in a manner that was vague, unclear, indefinite, duplicitous and in violation of his constitutional rights.**

In the case of *U. S.* v. *Donovan,* 339 F. 2d 404 (7th Cir. 1964), cert. den. 380 U. S. 975 (1965), the Court dismissed a series of counts, 48 through 74 which charged the defendant both as an "official of Local 775" and a "representative of employees". The Court of Appeals directed that the conviction on counts 48 through 74 be reversed and the sentence imposed thereon be vacated on the ground that the defendant was not informed in which category he was being charged and did not apprise him with reasonable certainty what accusations were made against him.

The Court of Appeals in the case at bar, said it had serious doubts about following *Donovan* and did not need to resolve the issue, saying that if there were any lack of clarity in the information it was corrected by the bill

of particulars furnished, which left no doubt that he was informed against in his capacity as an officer of the union. Nevertheless the information contained to describe the petitioner as a "representative and employee" and the Court struck proof seeking to establish that the petitioner was not a "representative".

In addition, the U. S. Attorney resisted the motion to dismiss the indictment charging the petitioner in his capacity as a "representative" and altho superseded by the information, the indictment remains on the docket of the trial court as of this moment. The Court below says one of the tests of duplicity is whether in the event of conviction a subsequent court will be able to determine the question of double jeopardy. Certainly the petitioner should not be exposed to the danger of a further prosecution by relying on a bill of particulars which merely states he is being charged as an officer, to wit, a financial secretary. This does not meet the test to determine if an indictment or information is properly drawn. See *Russell* v. *U. S.*, 369 U. S. 749, 763, 765. Nor does it conform with the admonition of this Court in the case of *Boyce Motor Lines* v. *U. S.*, 342 U. S. 337, 340, 72 S. Ct. 329, 330, where it said:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties and to guide the Judge in its application and the lawyer in defending one charged with its violation."

If this Court said that Congress in enacting a criminal statute must be definite, does a United States Attorney have any lesser duty to be definite with the Information with which he charges the petitioner with violating the Statute?

The Assistant U. S. Attorney informed the Trial Court that he could not get the Information past the Indictment

Committee of his office unless it was so worded. Nevertheless the learned Trial Court was itself unclear by the meaning of the Information and resulted in a great deal of questioning of the Assistant U. S. Attorney in an attempt to unravel the guess work and speculation that ensued.

## POINT III

**Evidence that the petitioner is an officer, *per se* insufficient to charge a violation.**

This Court in the case of *U. S.* v. *Ryan,* 350 U. S. 299, 76 S. Ct. 440 (decided before the 1959 amendment to the Taft Hartley law), referable to Section 186, said at page 301:

> "We do not decide whether any official of a Union is *Ex Officio* a representative of employees under Section 302. We believe however, that respondent's relationship brings him within that term."

A further probing of this question may be gleaned from the case of *U. S.* v. *Unger,* 357 F. 2d 91; 99, where the Court of Appeals (2nd Cir.), stated that the defendant's title as Secretary-Treasurer merely specified the way in which Unger was a representative of employees, as the indictment made clear that it was directed at Unger's receipt of money in his capacity as a representative of employees, who negotiated collective bargaining agreements.

Similarly the question was readily disposed of in the case of *U. S.* v. *Kramer,* 355 F. 2d 891, where at page 897 the Court noted that Kramer was the Financial Secretary and Treasurer as well as the business agent of Local 393 during the indictment period. If the Government merely had to show that Kramer was an officer, why did the Court rule, as noted above, that the testimony of the witness Benson was appropriate to determine the status of Kramer?

In the debate of the 86th Congress, First Session reported in the Congressional Record—Senate Vol. 105, Part V the intent of the framers of the section under consideration is spelled out to reach a union official, rather than an officer, who is exercising governing authority, even though he does not preside over union meetings, as would a president or vice president, does not have financial records as a secretary-treasurer who would have and does not have administrative or membership records as would a secretary.

Unless the relationship is tacked onto the words "officer or employee thereof" in Section 186(a)(2) as meaning a person clothed with this governing authority, all officers and employees, without exception, would be subject to the Act. Reverting back to the example of the chairwoman, who is an employee of a union, it is inconceivable that the framers intended all such persons, without distinction, as to their duties or relationship to the employer in the field of collective bargaining.

## POINT IV

**Character evidence, in some circumstances, may be enough to raise a doubt of guilt.**

In the case of *Michelson* v. *U. S.*, 335 U. S. 469, 476, this Court held that affirmative testimony of good character, alone, may in some circumstances be enough to raise a doubt of guilt and that in the federal court a jury in a proper cases should be so instructed. The inclusion of a charge to the jury that it may consider the character testimony offered on behalf of the petitioner along with all other evidence in the case deprived the petitioner of its full value in determining guilt beyond a reasonable doubt. See also *U. S.* v. *Minieri*, 303 F. 2d 550, 555.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

WILLIAM J. CORCORAN,
Counsel for the Petitioner,
11 Park Place,
New York, New York 10007

# APPENDIX

## Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 140—September Term, 1967.

(Argued October 18, 1967 Decided December 15, 1967.)

Docket No. 31429

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

ARTHUR J. FISHER,

*Appellant.*

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Before:

WATERMAN, MOORE and HAYS,

*Circuit Judges.*

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Appellant seeks reversal of the judgment of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Frankel, *J.* Judgment affirmed.

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JOHN S. ALLEE, PIERRE N. LEVAL, Asst. United States Attorneys, Robert M. Morgenthau, United States Attorney, *for Appellee.*

WILLIAM J. CORCORAN, Corcoran & Brady, New York City, *for Appellant.*

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WATERMAN, *Circuit Judge:*

On October 20, 1966 a two count information was filed in the United States District Court for the Southern District of New York against Arthur J. Fisher. Coun one charged the appellant with having violated 29 U. S. C. § 186(b)[1] in

[1] 29 U. S. C. § 186, in pertinent part, reads:

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(c) The provisions of this section shall not be applicable . . . (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business. . . .

*(Footnote continued on following page)*

that during a four month period from March 1, 1964 to June 30, 1964, he had received and had accepted construction materials and equipment from an employer at a time when he was an officer, employee and representative of a labor organization which represented employees of that employer. Count two charged Fisher with having additionally requested and demanded from his employer certain bathroom fixtures and a heating boiler. The appellant was tried to a jury which found him guilty on count one and not guilty on count two. The district court suspended imposition of sentence and placed appellant on probation for one year. On appeal from that judgment Fisher contends first, that his acknowledged status as a constitutional officer of the union is insufficient to sustain a violation of the act in the absence of proof that he in fact represented the employees in dealing with the employer; second, that the information was duplicitous; third, that the evidence was insufficient to support the verdict; and fourth, that a statement made by appellant to a government agent was improperly admitted into evidence. We find no merit to any of these contentions, and we affirm the judgment entered on the jury verdict below.

Throughout the relevant period in 1964 Fisher was the Financial Secretary of Local 137, International Union of Operating Engineers, and continued in that office in 1965. As a constitutional officer of the union Fisher had responsibility for the collection of union dues and was authorized by the by-laws to sit on the executive board of the union. From 1963 forward, during the same period, Fisher was employed as a master mechanic by Camarco Contractors, Inc., a construction company which employed members of

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*(Footnote continued from preceding page)*

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

Local 137. As master mechanic he was responsible for supervising the repair and the maintenance of equipment used by his employer.

The Government introduced evidence that tended to show that during the period from March to June 1964, Fisher received from Camarco more than seventeen truckloads of material including sand, crushed stone, gravel, cement and concrete, as well as the use of concrete forms and a digging machine known as a 977 front end loader. Delivery of this equipment and material was made by Camarco employees to the construction site of Fisher's home in Lake Carmel, New York.

Appellant contended below that these transactions were legitimate purchases rather than unlawful gifts, and to counter this contention the Government showed that, contrary to its customary record-keeping practice of its sales, Camarco, as to these Fisher transactions, prepared no sales slips or delivery tickets, made no entries in its sales journal, and prepared no invoices during 1964. Only a year later, in April or May 1965, after an intensive investigation by the Government had begun, did Fisher approach Camarco and ask to pay for this material. Following this request a bill was prepared after some difficulty, and Fisher paid it on May 10, 1965. The evidence indicated that Fisher asked that the bill be receipted "Paid in full" because that "was the way his attorney wanted it," and it was so receipted.

Fisher attempted to show that the material was sold to him and that the billing for the sales was delayed because Camarco's managers were forgetful and because they trusted him. He also sought to prove that the equipment was loaned to him in lieu of compensation due him for overtime. He produced testimony describing the nature of the duties performed by a master mechanic, and introduced, too, extensive testimony concerning his general reputation and position in the community.

We think it clear from the record, particularly when viewed in the light most favorable to the Government, that the evidence was sufficient for the jury to find that the transfer of material and equipment in 1964 was a gift and not a sale. Indeed, the appellant does not seem to challenge the sufficiency of the evidence on this feature of the proof. Rather, he suggests that his status as the employer's master mechanic dilutes in some way his position as an officer of the employees' union. This contention seems unrelated to the sufficiency of the evidence; if the nature of his position and the fact that his employer trusted him with supervisory responsibilities indicated that he was a good credit risk, that factor was but one of the factors in the record before the jurors when they determined that the transactions were not sales on credit but were gifts. And, needless to point out, a labor union's officer is not excluded from the reach of the statute because he is also a supervisor for a company with which his union collectively bargains.

Appellant principally argues that, though he was an officer, namely the Financial Secretary, of the union, this fact does not make him an "officer" within the meaning of 29 U. S. S. § 186(b) unless an additional showing is made that he represented the union members in their dealings with the employer. Fisher contends that he had no power "to sell out the union" or to enter into "sweetheart" contracts, and that he did not hear or present employee grievances or negotiate on behalf of the employees with the employer. Congress in 1959 foreclosed this argument when it passed Section 186 to cover "any officer or employee" of a labor organization. Despite this clear statutory language Fisher argues by reference to the legislative history of the enactment that Congress intended by the statute to include within the coverage of the act only those persons who performed critical functions within the union whether they had a title or not. This is surely true,

for the definition in 29 U. S. C. § 402[2] of "officer," was drafted to include not only the constitutional officers of unions but also the others whether or not entitled "officers" who performed the functions of officers or were members of a union's executive board. In so expanding the proscription of the act there is no indication, however, that Congress had any intention to exempt persons who *were* constitutional officers, or to require the courts to examine into the extent of a person's responsibility after it was established that the person held union office. See II N. L. R. B. Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1087-1096; Aron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 892-3 (1960).

Section 186 has the clear purpose of declaring unlawful all payments or valuable gifts or loans made by an employer to an officer, employee, or representative of a labor organization which represents employees working for that employer. It is not necessary that we decide the far reaches of this section—there can be no doubt that this appellant, as the Financial Secretary and a member of the executive board of Local 137 was an officer of Local 137 within the terms of the act.

The appellant also argues that the information charging him with this offense under Section 186 was duplicitous in that he was charged with accepting material from Camarco at a time when he was an "officer, employee, and repre-

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[2] Section 402 (n) reads as follows:

§ 402 Definitions

For the purposes of this chapter—

* * * * *

(n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

* * * * *

sentative of a labor organization." He claims that this amounts to charging him with separate offenses in one count, inasmuch as Section 186 covers representatives in subsection (a)(1) and covers officers and employees in subsections (a)(2) or (a)(4). He points out that in *United States* v. *Donovan,* 339 F. 2d 404 (1964) the Seventh Circuit held an indictment duplicitous on similar facts. We would have serious doubts about following *Donovan,* but we need not resolve the issue; here if there were any lack of clarity in the information it was corrected by the Bill of Particulars furnished to the defendant, which left no doubt that he was informed against in his capacity as an officer of the union. *United States* v. *Ricciardi,* 357 F. 2d 91, 99 (2 Cir.), *cert. denied,* 384 U. S. 924 (1966).

Furthermore, the appellant has utterly failed to show any prejudice to his preparation from the alleged defect in the information. *United States* v. *Gibson,* 310 F. 2d 79, 80 (2 Cir. 1962). The rules for testing duplicity are twofold: whether the information or indictment adequately informs the defendant of the nature of the charge so that he can prepare his defense; and whether in the event of a conviction a subsequent court will be able to determine the application of a double jeopardy defense. *United States* v. *Debrow,* 346 U. S. 374 (1953). In this case there was no room for doubt about the nature of the charge or about the defendant's conduct that the Government would have to prove to substantiate that charge. Fisher's claim that the information was duplicitous cannot be sustained.

In his reply brief in this court the appellant claims that the admission into evidence of testimony concerning a statement made by him on April 8, 1965, at a Camarco contract job site to an agent of the Government during an interview in the agent's car violated appellant's constitutional rights. The agent testified that Fisher was not arrested, restrained or told that his physical activities weging restricted. Appellant was told that he and

Camarco were under investigation, "that he did not have to make any statement, any statement he did make could be used against him in a court of law; prior to making a statement he had the right to consult an attorney of his choice." This warning complies with that approved in *Miranda* v. *Arizona,* 384 U. S. 436, decided June 13, 1966, in every particular except that Fisher was not told that counsel could be appointed for him if he lacked funds to retain an attorney. But it would appear that no clear objection was made at trial to this particular omission from the warning, and inasmuch as Fisher was evidently intelligent and aware of his rights, and inasmuch as the Government claims he had always retained an attorney in this matter and was earning approximately $450 a week, the omission of this warning, a warning that had no direct applicability to him, see *Miranda* v. *Arizona, supra* at 473, n. 43, is not so substantial an error that we should consider it in the absence of an objection as a clear error affecting this particular appellant's substantial rights. F. R. Crim. P. 52(b). Thus as it would seem that the warning met the constitutional standard we need not decide whether Fisher was "in custody" at the time his statement was made.

Finally, in passing, appellant appears to object to alleged defects in the charge to the jury, but we are unable to find any merit whatsoever in these claims. The charge on wilfulness is challenged, but it was identical to that approved in *United States* v. *Ricciardi,* 357 F. 2d 91, 100 (2 Cir.), *cert. denied,* 384 U. S. 924 (1966). At trial no objection was made to the portion of the charge relating to the central issue, whether the transactions were gifts or purchases from Camarco; in fact, appellant seemed pleased with this part of the charge and used it in his summation. And, lastly, the charge on character evidence, apparently sought to be questioned, was proper.

The judgment of conviction is affirmed.

## Judgment.

On this 1st day of May, 1967, came the Attorney for the Government and the defendant appeared in person, and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of while an officer, employee and representative of a labor organization which represents, seeks to represent and would admit to membership employees who employed in an industry affecting commerce, unlawfully, wilfully and knowingly requesting, demanding, receiving and accepting and agreeing to receive and accept building and construction materials, the use of building and construction equipment, and the use of workers in connection therewith from the employer of the aforesaid employees (Title 29, U. S. Code, Sections 186(b), 186(d), 142, 152), as charged in count one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of sentence on count one is suspended and the defendant is placed on probation for One (1) Year, subject to the standing probation order of this Court.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding industrious citizen and observe such conditions of probation as the court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

*Judgment.*

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

MARVIN E. FRANKEL,
United States District Judge.
JOHN J. OLEAR, JR.,
Clerk.

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1012

ARTHUR J. FISHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 15, 1967. The petition for a writ of certiorari was filed on January 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether a statement made by petitioner to government agents at his place of employment was properly admitted into evidence.

2. Whether the information under which petitioner was charged was duplicitous.



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3. Whether the evidence was sufficient to support the conviction.

4. Whether the instruction on character evidence was proper.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of violating 29 U.S.C. 186(b) by receiving equipment and materials from an employer at a time when petitioner was an officer, employee and representative of a labor organization which represented employees of that employer. The district court suspended imposition of sentence and placed petitioner on probation for one year.

1. In 1964 and 1965, petitioner was the financial secretary of Local 137, International Union of Operating Engineers (Tr. 154) and was in charge of collecting union dues. He also served on the executive board of the union, which had the power to review the acts of the official who conducted the daily affairs of the local (Tr. 857, 862–863, 865). Petitioner was employed as a master mechanic by Camarco Contractors, Inc., a company which employed members of Local 137, and was the person with whom the employer communicated about grievances with employees of the local (Tr. 168–170, 172, 175).

In the spring of 1964, petitioner began to build his own house (Tr. 42). Between March 1964 and June 1964, petitioner received from Camarco large quantities of sand, gravel, crushed stone, cement and concrete and the use of concrete forms and a front-end loader (see *e.g.*, Tr. 30–31, 132–133). Contrary to its

usual practice, Camarco prepared no business records of these transactions and did not bill petitioner (Tr. 261–263, 270–273, 276, 318–319). In May, 1965, subsequent to the start of the government's investigation into these transactions, Camarco prepared an invoice purporting to cover the deliveries to petitioner (Tr. 273–275).

2. On April 8, 1965, two FBI agents went to the Camarco job site where petitioner worked. They interviewed him for about 35 to 40 minutes in their automobile but did not arrest or otherwise restrain petitioner (Tr. 326–327, 336–337). At the outset of the interview, petitioner was admonished that he and Camarco were under investigation, that he did not have to make any statement, that he had a right to consult an attorney of his choice and that any statement that he made could be used against him in a court of law (Tr. 327–328, 330–331, 348). Petitioner advised the agents that he did not know whether he was ever going to be billed for the materials that he had received or whether the materials were gratuitous (Tr. 350–351). During the interview, petitioner called over a Camarco official to explain the deliveries of concrete (Tr. 351–352). The trial judge admitted petitioner's statement into evidence, rejecting petitioner's argument that he had not been adequately admonished about the privilege against self-incrimination and the right to counsel (Tr. 345–346).

## ARGUMENT

1. Although petitioner was interviewed by the FBI agents prior to this Court's decision in *Miranda* v.

*United States,* 384 U.S. 436, the warnings which he was given met the requirements of that decision. He was clearly informed that he did not have to make a statement and that he had a right to consult an attorney of his choice. Since his salary was $450 a week, the fact that the agents did not inform him that counsel could be appointed to represent him carries no significance. Moreover, petitioner was not taken into custody or otherwise deprived of his freedom of action. The brief interview at the site where he worked was obviously quite different from the in-custody interrogation to which the *Miranda* decision was directed. In these circumstances, petitioner's statements were properly admitted into evidence.[1]

2. The information charged petitioner with illegally receiving material in violation of 29 U.S.C. 186(b) at a time when he was "an officer, employee and representative of a labor organization."[2] In the bill of particulars the government stated that it would show that petitioner was "an officer of Local 137, International Union of Operating Engineers, to wit, Financial Secretary of said Local." After all the evidence had been presented, petitioner, for the first time,

[1] The claim that the initial answers of the FBI agent on voir dire examination concerning the warning given differed from his subsequent answers is refuted by the record (Tr. 327–328, 330–331, 338–339).

[2] That section makes it unlawful for any person to receive anything of value prohibited by section 186(a) which in turn makes it a crime (in subsection (a)(1)) for an employer to give anything "to any representative of any of his employees" and (in subsection (a)(2)) for an employer to give anything to "any labor organization, or any officer or employee thereof, which represents * * * employees of such employer * * *."

attacked the information on the ground that it was duplicitous because it charged him as both an officer and a representative (Tr. 1084–1088). Whatever the validity of *United States* v. *Donovan,* 339 F. 2d 404 (C.A. 7), upon which petitioner relies, it is inapplicable to this case. Here, petitioner was not remotely prejudiced by the wording of the information since the bill of particulars clearly informed him in which official capacity he was charged. At all events, any objection to an information on the ground of duplicity must be raised prior to trial. Rule 12(b)(2) F.R. Crim. P.; *United States* v. *Galgano,* 281 F. 2d 908, 911 (C.A. 2), certiorari denied *sub nom. Carminati* v. *United States,* 366 U.S. 960.

3. The evidence amply supports the conviction. Petitioner, as the financial secretary of the local and a member of its executive board, was clearly an "officer" representing "employees of such employer" within the meaning of the statute. It was, therefore, not necessary, as petitioner argues, that the government show that his position included some activity that would enable him as an "officer to commit the unfaithful acts of selling out the union" (Pet. 12). Moreover, petitioner could have betrayed the other employees both in his role as a member of the executive board and in his role as the person with whom the employer communicated in order to resolve grievances with members of the local. The issue of whether the materials were a gift or a sale was for the jury to resolve.

4. The trial court instructed the jury that evidence of good character was to be considered with all the

evidence in the case in determining petitioner's guilt or innocence; that the jury should give it such weight as it deemed warranted under all the facts and circumstances; and that such evidence, "when considered with all the other evidence in the case, may in itself be such to raise a reasonable doubt" as to the defendant's guilt (Tr. 1213). This was a proper instruction. See *United States* v. *Crosby*, 294 F. 2d 928, 948 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys.*

FEBRUARY 1968.